

On the other hand, Charter's arguments focus on the specific rule language that an ILEC "shall *permit a requesting* telecommunications carrier" (emphasis added) to access the NID, 47 C.F.R. § 51.319(c). Charter asserts it does not choose to use CenturyTel's NID on the occasions when Charter does house its connection within the NID. Charter asserts its use is involuntary and caused by CenturyTel's obstruction of the inside wire through CenturyTel's placement of its NIDs. Charter asserts such obstruction is inconsistent with the optional intent of the word "permit." *See* 47 C.F.R. § 51.319(c).

Further, Charter contends that the occasions where it does house its connection within CenturyTel's NID is not consistent with use of that NID as a UNE. Charter does not "use" the NID as contemplated by the FCC rules. Charter points out that the FCC does not define the term "use" with respect to NID access. Charter points out that CenturyTel does not dispatch a technician to disconnect its drop wire and CenturyTel continues to use the NID itself for grounding protection from lightning strikes, since CenturyTel's drop is still fully connected on the network side of the NID. Accordingly, CenturyTel has not provided "exclusive use of that facility" per 47 C.F.R. § 51.309. Charter points to CenturyTel's cost witness' testimony that CenturyTel's proposed charge is for use of the entire NID. Charter believes that CenturyTel is attempting to have Charter subsidize the entire cost of the CenturyTel NID, which CenturyTel continues to use itself as it tries to win back its former customers.

Charter believes the concept of "demarcation point" should not be included in the definition of NID. Charter refers to the language of 47 C.F.R. § 68.105(a), "[c]arrier-installed facilities at, or constituting, the demarcation point shall consist of wire or a jack conforming to the technical criteria" Charter points out that for purposes of this proceeding where the

installations at issue have jacks/NIDs the demarcation point is at the NID and not some point 12 inches beyond the NID. Even applying the concept of demarcation point, CenturyTel's network would end at the RJ-11 jack and the customer's inside wire begins at the same RJ-11 jack. So all of Charter's activity takes place on the customer side of the demarcation point. Further the concept of a demarcation point is solely related to where end user customer control of inside wire begins and ends. Charter believes that CenturyTel's efforts to include the point of demarcation in the definition of the NID attempts to establish new substantive rights and obligations for CenturyTel that do not exist under federal law.

The Panel determines that the record in this case is more supportive of Charter's characterization that any use it makes of the NID is involuntary and that Charter is not choosing to use a NID UNE. The Panel determines that the record is less supportive of CenturyTel's characterization that any use of a NID constitutes use as a UNE requiring UNE compensation. In making this determination, the Panel also considers the factors listed in Wis. Stat. § 196.03(6), in particular, (a) promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219; (b) promotion of customer choice; and (f) promotion of efficiency and productivity; with the other factors not being relevant to the issue at hand.

The record better supports Charter's contention that, in the circumstances where Charter's connection remains in the empty compartment on the customer side of the NID, it was not Charter's business decision to do so. The primary reason Charter leaves its connection within the NID is because in those cases CenturyTel's NID is the only point where the wires congregate and insufficient wiring is accessible to make a direct connection to the end user.⁴ Charter does not appear to avoid any costs in its own network when the connection remains

within the NID.⁵ Charter does not use the ground that is in the NID.⁶ CenturyTel cannot identify any functionality, other than possible weather protection that Charter receives. CenturyTel puts forward the logic that Charter must receive some functionality of a NID in that Charter uses the NID. This logic does not refute Charter's characterization that the use is because of obstruction where there is a lack of sufficient wiring to access the point of congregation of the customer inside wire. The record shows that with sufficient available wiring, Charter does not house any connection within the NID⁷ and thus does not seem to be seeking a weather protection function.

Accordingly, if CenturyTel's NID were always placed consistent with CenturyTel's stated "standard policy" it is not likely that Charter would leave any connection within the NID. CenturyTel's stated "standard policy" would leave at least 6 inches of wire inside the customer access side and make a "drip loop" of wire about 8 inches wide on the wire between the NID and the exit point.⁸ The record supports that Charter does not house its connections in the NID when this amount of wiring is available.

In this evolving dispute, there was a period of time when Charter always housed its connection within the NID referring to the convenience to the customer.⁹ Charter has adapted its installation methods without deterring customers and thus has limited the installations for which CenturyTel claims that charges apply. The record indicates that the current state of affairs in Wisconsin is such that, for about 90 percent of Charter's installations, Charter's technician can open the customer access side of the NID, disconnect the customer wire from CenturyTel's loop,

⁴ Transcript (Tr.) 320.

⁵ Tr. 294, 296.

⁶ Tr. 306.

⁷ Tr. 328.

⁸ Tr. 1326.

⁹ Tr. 315-317.

and connect the customer wire to Charter's loop at a location other than in CenturyTel's NID.¹⁰ In the remaining 10 percent of the installations, Charter leaves its connection inside the customer access side of the NID as that is the only point where the congregation of all the wires is accessible. It is this remaining 10 percent that CenturyTel claims compensation is due for Charter's use of the NID as a UNE. This sequence is more consistent with the characterization that Charter has been modifying its installation methods in order to avoid CenturyTel's charges and is not consistent with Charter choosing to purchase a needed function of the NID as a UNE.

Charter further expresses a concern that the number of installations with obstruction could increase, as CenturyTel's witness testified that CenturyTel has begun deploying a new type of NI—one with a punch out or grommet in the back.¹¹ Using a back wall opening would not allow all the wiring described in CenturyTel's standard policy to enter a NID and thus would increase the number of installations where Charter could incur charges. CenturyTel's acknowledgement that it has begun to deploy NIDs that would not provide sufficient wiring for competing carriers to connect is more consistent with the Charter's characterization that CenturyTel is obstructing a competing carrier's access. Although CenturyTel claims to have a standard policy that provides sufficient wiring for competitor's access, it then also states it has begun deploying NIDs that would not be consistent with that policy. Further any stated policy by CenturyTel is a unilateral policy established through documents that CenturyTel controls.

To allow CenturyTel to chose methods of placement of its NID that would force Charter into "an option" requiring purchase of a UNE from CenturyTel is not consistent with the unbundling provisions of the Telecommunications Act of 1996 (Act). Generally, the Act

¹⁰ Tr. 313.

¹¹ Tr. 1266.

requires incumbent LECs to provide use of their networks on an unbundled basis to facilitate competition and provide new competitors options where they can lease a portion of the incumbent's network instead of building their own networks. The specific elements of the network for which unbundling is required are restricted to those in which a competitor's ability to provide the services it seeks to offer would be impaired without access to the network element.¹² Creating situations that would limit a competing carrier's option to fully use its own network is not consistent with the purpose of unbundling. Certainly, the Commission's support of such a placement method would not be consistent with the factors listed in Wis. Stat. § 196.03(6) regarding promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219, promotion of customer choice; and promotion of efficiency and productivity. Further, to the extent that the Commission determines any practice or act to be unjust, unreasonable, insufficient, or preferential, the Commission can issue a remedial order under Wis. Stat. § 196.37(2).

Furthermore, CenturyTel's continued use of the NID for its own network grounding purposes¹³ is inconsistent with its claim that it is providing the NID as a UNE to Charter. The Panel interprets the deciding factor to be not whether Charter obtains any use from the NID, but whether CenturyTel has provided to Charter its entitled "exclusive use of that facility."¹⁴ This interpretation is consistent with the description of the NID as a stand-alone network element and with the cost of the element based on the entire cost of the NID.

Housing wiring within a NID, because insufficient wiring is available to reach a point outside the NID, appears to be a problem related to converting from a system of regulation of a

¹² 47 U.S.C § 251(c)(3) and §251(d)(2).

¹³ Tr. 1202, 1254.

monopoly incumbent provider to a system of regulation that relies on competition to the maximum extent possible. As NIDs are installed on a going forward basis, placement methods should be used that will provide sufficient wiring such that 100 percent of the installations would allow a competitor's placement of its connection outside the NID. It would be a deterrent to competition to increase the number of instances where insufficient wiring is available to place a connection outside the NID.

There are many other circumstances in opening markets to competition where some costs have been imposed on incumbents. (See Issue 16 regarding network upgrades). However, incumbents have also received the benefits of reduced regulation of most other aspects of their business. Allowing connections to be left within NIDs until NIDs have sufficient wire to place connections outside the NIDs appears to be a reasonable practice in a transition to a competitive environment. It would not be a confiscation of property without compensation. Furthermore, CenturyTel retains the option to remove its NID from the customer's premise at any time.

CenturyTel's proposal to insert the concept of the demarcation point into the definition of the NID would appear to limit Charter's access to the customer's inside wire. The FCC's definition of the term demarcation point is provided in the context of clarifying an end users' ability to connect terminal equipment to the telephone network. While the FCC used the term demarcation point in its definition of the local loop UNE, 47 C.F.R. § 51.319(a), that use appears to expand rather than diminish a competitor's access to a loop. The FCC does not include the term demarcation point in the definition of the NID. 47 C.F.R. §51.319(c). Adding the concept of demarcation point into the definition of the NID would not improve a competitor's access and could serve to diminish a competitor's access to the customer's inside wire. To

¹⁴ 47 C.F.R §51.309.

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insert the term "demarcation point" into the definition of the NID, as CenturyTel proposes, would not foster the promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219, the promotion of customer choice, or the promotion of efficiency and productivity.

Issues 2 and 25 Award

For the reasons stated above, the Panel awards the language proposed by Charter for Art. II, section 2.103; Art. VI, sections 3.4, 3.5 and 3.51, and Art. XI Pricing, as it relates to outside facility connection charges.

Issue 3(a): How should the Agreement define the term "Tariff?"

Issue 3(b): How should specific Tariffs be incorporated into the Agreement?

Issue 43: How should specific Tariffs be incorporated into the Agreement?

The parties propose to incorporate by reference specific provisions found in Century's intrastate and interstate tariffs. Issue 43 identifies 13 such references. The issue in dispute concerns the scope and meaning of those references.

Position of the Parties

(a) Charter

The petitioner proposes the following language for Article I, Section 3 of the Interconnection Agreement:

Unless otherwise specifically determined by the Commission, in case of conflict between the Agreement and either Party's Tariffs relating to ILEC and CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. In no event shall a Tariff alter, curtail, or expand the rights of either Party under this Agreement, except by mutual consent. Either Party's Tariffs and/or State Price Lists shall not apply to the other Party except to the extent that this

Agreement expressly incorporates **specific rates or terms set forth in** such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs and/or State Price Lists.

The petitioner proposes the following language for Article II, Section 2.140 of the Interconnection Agreement:

2.140 Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time, **that the Parties have specifically and expressly identified in this Agreement for the purpose of incorporating specific rates or terms set forth in such document by mutual agreement.**

(b) CenturyTel

CenturyTel objects to the third sentence in Charter's proposal and would instead word Article I, Section 3 as follows:

Unless otherwise specifically determined by the Commission, in case of conflict between the Agreement and either Party's Tariffs relating to ILEC and CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. In no event shall a Tariff alter, curtail, or expand the rights of either Party under this Agreement, except by mutual consent. Either Party's Tariffs and/or State Price Lists shall not apply to the other Party except to the extent that this Agreement expressly incorporates such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs and/or State Price Lists.

CenturyTel also objects to Charter's proposed wording of Article II, Section 2.140 of the Interconnection Agreement, and would instead word that section as follows:

2.140 Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time. Either Party's Tariffs shall not apply to the other Party except to the extent that this Agreement expressly incorporates such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs.

Discussion

In prior arbitrations, the Panels awarded contract language preventing the ILEC party from forcing the CLEC party to accept the rates and terms set forth in an ILEC tariff in lieu of negotiation or arbitration of the same rates and terms in the interconnection agreement. The concern is that the ILEC party can typically change the tariff terms unilaterally, without prior notice to a customer of the change. If the interconnection agreement incorporates a tariff provision by reference, an amendment to the underlying tariff could result in a material change to the interconnection agreement without prior notice to the other contract party. For this reason, one prior Panel directed the parties to replace all tariff references with the corresponding tariff text, while another Panel gave the parties the option of replacing the tariff references with the corresponding text in the absence of mutual agreement.

Here, the parties appear to accept that tariff references may only be incorporated into the agreement if both parties agree to the reference. The parties dispute whether a tariff reference should be understood to refer merely to the cited provision or whether a reference incorporates the complete description of the service set forth in the tariff.

In their briefs, the parties debate the relevance of the filed rate doctrine to this dispute. This discussion is misdirected. The issue here is how best to ensure that the parties have clearly and knowingly agreed to the terms and conditions under which a service will be provided under the interconnection agreement. The simplest way to obtain this assurance is to forbid the parties from incorporating tariff provisions by reference altogether. However, it is clear that the list of tariff references proposed in Issue 43 is for the most part not controversial. Thus, those tariff

references may provide a convenient shorthand to incorporate an agreed upon framework for the telecommunications service the parties will exchange.

With respect to the question of which proposed language set best captures the policy choice the Panel has advanced, the Panel awards the language proposed by CenturyTel. The problem with the Charter language is that it picks and chooses from a larger set of tariff provisions a subset that would govern the service within the interconnection agreement. Thus, in a sense, the parties would be creating a new version of the service at issue using language pulled out of the context of the tariff in which those provisions are found.

By contrast, the CenturyTel language would incorporate the existing service as it is presently offered under tariff. Under the CenturyTel language, the parties could either take the service feature as it currently offered under the tariff, with all the applicable rates, terms and conditions in effect, or replace the tariff reference with plain language text that sets forth the conditions of service in explicit, if lengthy, detail. This choice is more straightforward, and less likely to result in misunderstanding than the Charter proposal.

Issues 3 and 43 Award

The Panel awards the language proposed by CenturyTel for Article I, Section 3 and Article II, Section 2.140. The Panel expects given this award and the awards on other issues, the parties can reach their own agreement on redrafting the contract.

Issue 4(a): Charter version: Should the Agreement include terms that allow one Party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?

CenturyTel version: Should a Party be allowed to suspend performance under or terminate the Agreement when the other Party is in default, and the defaulting Party refuses to cure such default within thirty (30) days after receiving notice of such default? How should "default" be defined in the Agreement?

Issue 8: There are two separate issues presented in Issue 8:

Issue 8(a): Charter version: Should the bill payment terms related to interest on overpaid amounts be equitable?

CenturyTel version: Should the *billed Party* be entitled to receive interest from the billing Party on amounts paid to the billing Party in error and which are later returned to the billed Party?

Issue 8(b): Charter version: Should the bill dispute provisions ensure that neither Party can improperly terminate the Agreement in a manner that could impair service to the public?

CenturyTel version: Should the billing Party be permitted to suspend or discontinue accepting orders from the billed Party under certain conditions when the billed Party fails or refuses to pay "undisputed" charges?

Issue 13: Charter version: Should the Parties agree to a reasonable limitation as to the period of time by which claims arising under the Agreement can be brought?

CenturyTel version: There are two issues presented in this Issue 13: (a) If the Parties are unable to resolve a "billing dispute" through established billing dispute procedures, should the billed Party be required to file a petition for formal dispute resolution within one (1) year of providing written notice of such dispute, or otherwise waive the dispute?

(b) To the extent a "Claim" arises under the Agreement, should a Party be precluded from bringing such "Claim" against the other Party more than twenty-four (24) months from the date of the occurrence giving rise to the "Claim?"

Issue 4(a) covers a dispute over the language in Section 2.6, regarding suspension or termination of the interconnection agreement upon default and the definition of default. Both Parties propose language in Section 2.6 that makes reference to language in their respective proposed Section 9, including Sections 9.5, 9.5.1 and 9.5.2., which cover the effect of non-payment and where CenturyTel also proposes language to allow it to cease processing orders and to disconnect services. Sections 9.5, 9.5.1, and 9.5.2 are also disputed in Issue 8. Issue 8 and Issue 13 further cover a dispute regarding the language in Section 9.4 concerning the time period

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in which disputes must be raised. In light of the interrelationship of these issues, it is reasonable to analyze the three issues together.

Positions of the Parties:

(a) Charter

Charter believes the terms for suspension or termination of an agreement, in whole or in part, should allow for Commission oversight. Specifically, Charter seeks terms that in no event can a termination occur without an order from the Commission to do so. Charter objects to CenturyTel's proposed terms which it believes would allow CenturyTel to unilaterally terminate the agreement. As both Parties' end user customers rely on the physical interconnection to send and receive calls, self-help termination provisions should not be allowed. Charter believes that allowing a termination following the initiation of bankruptcy would conflict with the federal statutory "automatic stay" associated with bankruptcy.

In light of a history of inaccurate CenturyTel bills, Charter believes a 30 day notice of failure to pay undisputed amounts is not realistic. Charter believes that CenturyTel is not entitled to a presumption that CenturyTel's bills are accurate, and the burden of persuasion or burden of proof should fall on CenturyTel to show its bills are accurate. Charter states CenturyTel has refused to acknowledge disputes Charter has raised. For purposes of equity, interest should be paid reciprocally on both unpaid undisputed amounts, and paid but later disputed amounts. Charter proposes a two year time limit from the date of occurrence of the action for either party to raise claims regarding an action. Charter believes the two year time limit is consistent with Section 415 of the Communications Act. If CenturyTel has not pursued a claim for unpaid amounts within that time, the amounts would cease to be due.

(b) CenturyTel

CenturyTel believes that a lengthy process should not be needed to recover billed and undisputed charges. CenturyTel proposes adding the failure to pay undisputed amounts to the list of items constituting a default. CenturyTel believes that its bills are presumptively accurate unless Charter disputes the bill. CenturyTel's proposal would allow it to cease processing orders or disconnect services if the billed party does not remit undisputed amounts.

CenturyTel further proposes a process whereby Charter can pay a bill and later dispute it within one year of the date of the bill. However, interest would only be paid from the date Charter disputes the bill and not the date of the bill. This is reasonable because Charter has the option to dispute a bill and withhold payment. However, CenturyTel proposes that the dispute would need to be escalated to the dispute resolution process of Section 20.3 within one year of the bill date, or Charter would waive its right to withhold payment.

CenturyTel states that its proposals would not allow it to disrupt the exchange of traffic absent involvement of the Commission, as it proposes to cease to process orders or to disconnect services but not to terminate interconnection. CenturyTel believes its proposals are commercially reasonable and create proper incentives for both parties to perform their respective duties.

Proposed Contract Language

Charter and CenturyTel each propose certain language for Article III., Sections 2.6, 9.4, 9.4.1, 9.4.2, 9.5, 9.5.1, 9.5.2, and 20.4.

- 2.6 Suspension or Termination Upon Default. Either Party may suspend or terminate this Agreement, in whole or in part, in the event of a Default (defined below) by the other Party; *provided, however*, that the non-defaulting Party notifies the defaulting Party in writing of the Default and the defaulting Party does not cure the Default within thirty (30) calendar days of receipt of written notice thereof. has complied with the dispute resolution provisions of this Agreement, including Section 20. Following CenturyTel's notice to **CLEC of its Default, CenturyTel shall not be required to process new service orders until the Default is timely cured.

"Default" is defined to include:

- (a) A Party's insolvency or the initiation of bankruptcy or receivership proceedings by or against the Party; or
- (b) The final revocation by the Commission of a Party's Certificate of Operating Authority and transition of End Users to another carrier, or
- (c) A decision pursuant to the Formal Dispute Resolution provisions of Section 20 of this Agreement that a Party has materially breached any of the terms or conditions hereof, except in no event should termination occur unless so ordered by the Commission A Party's violation of any material term or condition of the Agreement; or
- (d) Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9, and subject to either Party invoking its rights under Section 20, Dispute Resolution, except

that in no event should termination occur unless so ordered by the Commission. A Party's refusal or failure in any material respect properly to perform its obligations under this Agreement, including but not limited to its refusal or failure to pay undisputed charges (pursuant to Section 9) within thirty (30) calendar days after the bill date.

- 9.4 Disputed Amounts. The following shall apply where a Party disputes, in good faith, any portion of an amount billed under this Agreement ("Disputed Amounts"). Both **CLEC and CenturyTel agree to expedite the investigation of any Disputed Amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution. If the Parties cannot resolve the dispute through established billing dispute procedures within 180 days of the billed Party providing written notice of Disputed Amounts to the billing Party, the billed Party shall file a petition for formal dispute resolution pursuant to Section 20.3 of this Article (without regard for any further informal dispute resolution negotiations that may be referenced in Section 20.3). If the billed Party fails to seek formal dispute resolution pursuant to Section 20.3 within one (1) year of the billed Party providing written notice to the billing Party of such Disputed Amounts, the billed Party waives its alleged entitlement to and/or right to withhold such Disputed Amount.

9.4.1 Disputed Amounts Withheld From Payment.

If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party may withhold payment of such Disputed Amounts only if it gives written notice to the billing Party of the amounts it disputes and includes in such notice the specific details and reasons for disputing each item. Such written notice shall be submitted in accordance with the **following agreed upon procedures; as set forth in Attachment 1 to the Interconnection Agreement guidelines for submitting billing dispute claims set forth in CenturyTel's CLEC Service Guide.** Disputed billing claims shall be submitted no later than the Bill Due Date. Failure by the billed Party to file any such claim on or prior to the Bill Due Date means that the total charges billed are due and payable to the billing Party on the due date. The billed Party shall pay all undisputed amounts no later than the Bill Due Date. The billed Party may not withhold payment of amounts past the due date pending a later filing of a dispute, but must pay all amounts due for which it has not provided a written notice of dispute on or prior to the Bill Due Date. If the billed Party disputes charges after the Bill Due Date and has not paid such charges, such charges shall be subject to late payment charges. If the billed Party disputes any charges and any portion of the dispute is resolved in favor of the billed Party, the Parties shall cooperate to ensure that the billing Party shall credit the invoice of the billed Party for that portion of the Disputed Amount resolved in favor of the billed Party, together with any late payment charges assessed with respect thereto no later than the second Bill Due Date after the resolution of the billing dispute. Nothing in this Section 9.4.1 shall constitute a waiver, or negation, of a Party's right to seek recovery of amounts already paid pursuant to Section 9.4.2 below.

9.4.2 Billing Disputes Related to Paid Amounts

If any portion of an amount paid to a Party under this Agreement is subject to a bona fide dispute between the Parties ("Disputed Paid Amount"), the billed Party may provide written notice to the billing Party of the Disputed Paid Amount, and seek a refund of such amount already paid, at any time prior to the date that is one (1) year after the date of the invoice containing the disputed amount that has been paid by the billed Party ("Notice Period"). If the billed Party fails to provide written notice of a Disputed Paid Amount within the Notice Period, the billed party waives its rights to dispute its obligation to pay such amount, and to seek refund of such amount. At the billed Party's request, the billing Party will refund the entire portion of any Disputed Paid Amounts resolved in favor of the billed Party, subject to a rate of interest equal to one and one half (1 ½%) per month or the highest rate of interest that may be charged under Applicable Law, compounded daily, for the number of days from the Bill Date until the date on which such payment is made.

9.5 Effect of Non-Payment.

- 9.5.1 If the billed Party does not remit payment of all undisputed charges on a bill by the Bill Due Date, the billing Party may ~~discontinue processing orders for relevant or like services provided under this Agreement on or after the tenth (10th) calendar day following the Bill Due Date~~ initiate dispute resolution procedures under Section 20 of this Agreement. The billing Party will notify the other Party in writing, via email or certified mail, at least five (5) Calendar Days prior to discontinuing the processing of orders for the relevant services. If the billing Party does not refuse to accept additional orders for service(s) on the date specified in such notice, and the billed Party's non-compliance continues, nothing contained herein shall preclude the billing Party from refusing to accept any or all additional orders for service(s) from the non-complying Party without further notice or from billing and collecting the appropriate charges from the billed Party. For order processing to resume, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. Additionally, the billing Party may require a deposit or assurance of payment (or additional deposit or assurance of payment) from the billed Party, pursuant to Section 6. In addition to other remedies that may be available at law or equity, the billed Party reserves the right to seek equitable relief, including injunctive relief and specific performance.
- 9.5.2 Notwithstanding 9.5.1 above, if the billed Party does not remit payment of all undisputed charges on a bill by the Bill Due Date, the billing Party may at its option disconnect any and all relevant or related services provided under this Agreement following written notification to the billed Party at least seven (7) Business Days prior to disconnection of the unpaid service(s). Such notification may be included in a notification to refuse to accept additional orders so long as the appropriate dates for each consequence are listed therein. If the billed Party subsequently pays all of such undisputed charges and desires to reconnect any such disconnected services, the billed Party shall pay the applicable charge set forth in this Agreement or in the applicable Tariff for reconnecting each service disconnected pursuant to this paragraph. In case of such disconnection, all applicable undisputed charges, including termination charges, shall become due and payable. If the billing Party does not disconnect the billed Party's service(s) on the date specified in such notice, and the billed Party's non-compliance continues, nothing contained herein shall preclude the billing Party from disconnecting all service(s) of the non-complying Party without further notice or from billing and collecting the appropriate charges from the billed Party. For reconnection of the non-paid service to occur, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. Additionally, the billing Party may require a

deposit or assurance of payment (or additional deposit or assurance of payment) from the billed Party, pursuant to Section 6. In addition to other remedies that may be available at law or equity, the billing Party reserves the right to seek equitable relief, including injunctive relief and specific performance. [RESERVED FOR FUTURE USE]

20.4 Limitation Period on Claims.

Except as otherwise specifically provided in this Agreement, no Claims will be brought for disputes arising from this Agreement more than twenty-four (24) months from the date of the occurrence which gives rise to the dispute. Notwithstanding the foregoing, Claims for indemnification will be governed by the applicable statutory limitation period.

"CLAIMS"

The term Claims means any pending or threatened claim, action, proceeding or suit.

Discussion:

The subject of termination of an interconnection agreement due to a default is not addressed directly by the Act or the implementing rules adopted by the FCC. However, the Commission is a state agency created by the legislature and has those powers that the state legislature has conferred upon it. Thus to the extent that the parties choose to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199, the administration of which is in the hands of the Commission, to resolve their disagreement and any other relevant provisions of Wis. Stat. ch. 196. Pursuant to Wis. Stat. § 196.37, the Panel will award terms it considers to be just and reasonable and provide for reasonable interactions between telecommunications carriers. The Panel finds provisions of both Parties' proposals to be unreasonable.

The Panel agrees with Charter that parts of CenturyTel's proposed language would allow CenturyTel to unilaterally terminate the agreement. The language proposed by CenturyTel for Section 2.6 would allow it to cease processing orders upon notice of default. That combined with the language in Section 9.5.1 would allow CenturyTel to discontinue processing orders when payment is 10 days late, given 5 days notice; and disconnect services with 10 days notice. Ceasing to process orders or disconnect service is no less detrimental to an ongoing business than cutting off interconnection. The time periods proposed by CenturyTel are inadequate and would not allow Charter to seek Commission intervention under Wis. Stat. § 196.199 in which a party has five days to allege a failure has a significant adverse effect on the ability to provide services to customers, and the Commission has 30 days to make a determination on that request. The Panel believes nothing in the interconnection agreement should serve to limit Charter's ability under Wis. Stat. § 196.199 to bring matters to the Commission that could have a significant adverse affect on Charter's ability to provide telecommunications services to its customers or potential customers. However, Charter's proposal does not include any specified time frame for default. In docket 05-MA-147, a sixty day time frame was adopted for this purpose.¹⁵ Further, like docket 05-MA-147, the Panel will not require an order from the Commission for termination of an agreement. Like docket 05-MA-147, this Panel's concern is this could require duplicative processes.

While CenturyTel believes its proposals are commercially reasonable, CenturyTel fails to recognize the context in which billing disputes now occur between telecommunications carriers. It is not a cut and dry matter that a service has been provided, and therefore must be paid for.

¹⁵ Arbitration Award, *Petition for Arbitration of Interconnection Rates, Terms and Conditions Between Charter Fiberlink, LLC and Wood County Telephone Company d/b/a/ Solarus*, No. 05-MA-147 (Wis. PSC Oct. 23, 2008).

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Issues arise as to whether or not a service has been provided. For an example see issue 2 regarding NID charges. Billing is used as a forum in which interpretations are asserted concerning the obligations and duties of carriers under the Act. Charter provides the further example of local number portability charges in Missouri, where the Missouri commission determined CenturyTel's application of a rate from its local exchange tariff was not permissible and was in violation of the terms of the interconnection agreement between Charter and CenturyTel.¹⁶ Charter points out that CenturyTel has simply refused to acknowledge Charter disputes. The Panel will award language such that any assertion of default is subject to the dispute resolution procedures of Section 20 with the ability to seek Commission resolution. Further, allowing a termination of an interconnection agreement at the time of an initiation of bankruptcy proceedings would conflict with the federal statutory "automatic stay" associated with bankruptcy. The Panel will award language consistent with the bankruptcy process.

However, a carrier should not be permitted to dispute bills for the purpose of avoiding payment completely. Charter's proposal, to require CenturyTel to pursue a claim for unpaid amounts within two years of occurrence or the amounts would cease to be due, is not reasonable. Valid charges should not cease to be due until paid. To achieve greater certainty in business and operations both parties should work together to resolve disputes. Charter's reference to Section 415 of the Communications Act is inappropriate as that is a time period in which to raise a dispute, not a time period in which to end a dispute which is the context Charter proposes. Charter's concerns, regarding Charter as the initiator of a billing complaint and Charter's concern that the burden of persuasion or burden of proof should be placed upon CenturyTel to show its bills are accurate, are out of context. The procedures under Wis. Stat. § 196.199

¹⁶ Case No. LC-2008-0049.

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provide for an investigation in which all the relevant factors can be considered. However, it is reasonable for Charter to withhold payment, with possible escrow provisions, for as long as a good faith billing disputed exists. It would be arbitrary to require payment after one year when a good faith dispute is not settled.

It is reasonable for CenturyTel to limit the time frame to raise a dispute to one year as CenturyTel only provides itself the ability to back bill a previously unbilled amount within one year of providing services per section 9.1. Reciprocity is a reasonable standard for both back billing and raising billing disputes. Further, it is reasonable to limit the payment of interest on refunded amounts to the date a dispute is raised in order to provide appropriate incentives to review bills on a timely basis.

Issues 4(a), 8(a), 8(b), and 13 Award

As both parties have referred to the language awarded in a recent arbitration award in docket 05-MA-147 in association with default, this award will draw from that language with variation for the specific issues raised in the case. The Panel awards the following language in lieu of the language proposed by either of the two parties:

2.6 Suspension or Termination Upon Default. Subject to either Party invoking its rights under Section 20, Dispute Resolution, either Party may terminate this Agreement in whole or in part in the event of a default by the other Party as defined by this section 2.6; provided however, that the non-defaulting Party notifies the defaulting Party in writing ("Default Notice") of the alleged default and the defaulting Party does not cure the alleged default within sixty (60) calendar days of receipt of the Default Notice.

Default is defined as:

- (a) A Party's insolvency or initiation of bankruptcy or receivership proceedings by or against the Party, consistent with any order, decision, or other binding action taken by the bankruptcy court, or similar adjudicator of the parties' rights in the event of receivership or bankruptcy; or

- (b) The final revocation by the Commission of a Party's Certificate of Operating Authority, and transition of End Users to another carrier; or
- (c) A decision pursuant to the Formal Dispute Resolution provisions of Section 20, Dispute Resolution, that a Party has materially breached any of the terms or conditions hereof; or
- (d) Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9, Billing and Payments/Disputed Amounts, subject to either Party invoking its rights under Section 20, Dispute Resolution.

Notwithstanding any other provision of this Section 2.6 and except as may be prohibited by applicable federal law, either party, as allowed by Wis. Stat. § 196.199, may seek relief from the other party's claims, assertions, actions, or inaction in breach of this Agreement.

9.4 Disputed Amounts. The following shall apply where a Party disputes, in good faith, any portion of an amount billed under this Agreement ("Disputed Amounts"). Both Charter and CenturyTel agree to expedite the investigation of any Disputed Amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution.

9.4.1 Disputed Amounts Withheld From Payment. Charter proposed language.

9.4.2 Billing Disputes Related to Paid Amounts. Charter proposed language, except "from the date the dispute is raised" shall replace "from the Bill Date."

9.5 and 9.5.1 Effect of Non-Payment. Charter proposed language.

9.5.2 Omitted

20.4 Limitation Period on Claims. Omitted.

Issue 4(b): What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?

Issue 5: Charter version: Should the Agreement allow either Party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other Party's consent?

CenturyTel version: Should a Party's right to assign its rights and obligations under the Agreement *without consent* to a subsidiary or Affiliate be restricted to only those assignments made in conjunction with the sale of all or substantially all of the Party's assets?

Issue 4(b) addresses sales or transfers of an operating area or a portion thereof to a non-affiliated entity. Issue 5 addresses assignment of an interconnection agreement to an affiliated company. The issues address whether the purchasing party or affiliate should be required to assume all the duties and obligations of the existing interconnection agreement.

Positions of the Parties

(a) Charter

In relation to Issue 4(b), Charter proposes that any "third-party buyer/transferee should be required to assume the terms of the Agreement" as a precondition for a sale/transfer. Charter expresses concern that both parties would need to "remain connected to the public switched telephone network." Charter also notes that it has "exerted considerable time, and expense, to negotiate and arbitrate the terms of the Agreement." Charter believes the benefits of such efforts "should last for the duration of the Agreement."

However, in Issue 5, Charter further proposes that "in the event of a sale of substantially all assets" either Party can assign all of its rights and duties without being required to seek the consent of the other Party. It is not clear whether Charter's proposal is intended to apply just to affiliates or whether it is intended to apply to non-affiliates as well. In its brief Charter refers to "third parties (which includes either Party's Affiliates or subsidiaries)." Charter's statement of Issue 5 does not include the word affiliate. In relation to consent, Charter states, "there is no dispute between the Parties with respect to language that requires that "consent shall not be unreasonably withheld, conditioned, or delayed."

(b) CenturyTel

For issue 4(b) concerning the sale of a specific operating area or portion thereof to a non-affiliated third-party, CenturyTel proposes that the existing interconnection agreement would terminate upon 90 days notice. CenturyTel believes any concerns regarding interconnection with the new non-affiliated purchasing company would be addressed by 47 C.F.R. § 51.517(d) which requires an immediate interim transport and termination arrangement pending negotiation or arbitration of a new agreement. CenturyTel objects to Charter's language that would require the non-affiliated purchasing party to assume the existing interconnection agreement. CenturyTel believes such terms would effectively give Charter veto power over any sale and would likely devalue the assets that are subject to the sale.

In relation to Issue 5, regarding an assignment to an affiliated party, CenturyTel proposes that either Party should be allowed to assign the rights and duties under an interconnection agreement to an affiliate without the other Party's consent so long as 90 days notice is given; the affiliate assumes all the rights and duties in writing; and the other Party is reasonably satisfied that the affiliate will be able to fulfill the assigned obligations. CenturyTel believes Charter's proposed language would limit such an assignment to an affiliate to only those situations "where a Party is closing its doors (*i.e.* selling all or substantially all of its assets)." CenturyTel says that Charter has provided no reason for adding such a limitation.

Proposed Contract Language

Charter and CenturyTel each propose certain language for Article III, section 2.7, and section 5.

- 2.7 Termination Upon Sale. Notwithstanding anything to the contrary contained herein, a Party may terminate this Agreement as to a specific operating area or portion thereof if such Party sells or otherwise transfers the area or portion thereof to a non-affiliate. **The right of termination provided herein is expressly conditioned upon, and subject to, unconditional and prompt acceptance of the terms of this Agreement by the non-affiliated Party.** The selling or transferring Party shall provide the other Party with at least ninety (90) calendar days' prior written notice of such termination, which shall be effective on the date specified in the notice the non-Affiliated Party provides formal, written notice of its acceptance and assumption of the rights, obligations, and duties of the Party selling or transferring the area, and the other Party being reasonably satisfied that the Party acquiring the area is able to fulfill the obligations hereunder. Such acceptance and assumption shall be memorialized in a form mutually agreed upon by both Parties. Notwithstanding termination of this Agreement as to a specific operating area, this Agreement shall remain in full force and effect in the remaining operating areas. The Parties agree to abide by any applicable Commission Order regarding such sale or transfer.

5. **ASSIGNMENT**

Any assignment, in whole or in part, by either Party of any right, obligation, duty or interest arising under the Agreement without the written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed, shall be null and void, except that either Party may assign, **in conjunction with the sale of all or substantially all assets, and to the extent consistent with Applicable Law, all of its**

rights, and delegate its obligations, liabilities and duties under this Agreement, either in whole or in part, to any entity that is, or that was immediately preceding such assignment, a subsidiary or Affiliate of that Party without consent, upon ninety (90) calendar days' written notification. The effectiveness of an assignment shall be conditioned upon the assignee's written assumption of the rights, obligations, and duties of the assigning Party, and the other Party being reasonably satisfied that the assignee is able to fulfill the assignor's obligations hereunder. Any attempt to make an assignment or delegation in violation of this section shall constitute a default of this Agreement.

Discussion

There is no testimony for issue 5. The parties stated their intention to limit their arguments to briefs for issue 5.¹⁷ There is testimony in relation to Issue 4(b). The Panel looks to 47 C.F.R. § 51.715(d) as referenced by CenturyTel. When the Commission would approve or reject such future interconnection agreements, the standard the Commission would apply would